SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS,
Petitioner,

versus

ARKANSAS LOUISIANA GAS COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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September 12, 1938.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

SUBJECT INDEX

LIST OF AUTHORITIES

Cases:

LIST OF AUTHORITIES—(Continued)

Cases (Continued)

LIST OF AUTHORITIES—(Continued)

Statutes:

Texts:

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May It Please the Court:

I.

PRELIMINARY STATEMENT.

The opinion of the Court of Appeals by Judge Hutchinson, as is his practice, so clearly and succinctly states the case, the issues and controlling decisions, that it is almost with apologies for presumption that we submit this brief in opposition to the petition for Certiorari to that Court.

The facts, involving several rate controversies in both Texarkana, Texas, and Texarkana, Arkansas, are de-

tailed and lengthy. They are fully set out in respondent's separate amended answer (R. 122-208) and summarized in Judge Hutchinson's opinion (R. 423); 97 Fed. (2) 5, Advance Sheets. Since the statement of facts set out by petitioner materially differs from the statement in the opinion of the Court of Appeals and from the record, reference is made to R. 122-208.

The case involves the question of the validity of Section IX, its construction and effect upon Section V of the natural gas franchise ordinance that was granted to respondent by the City Council of Texarkana, Texas, on June 13, 1930.

Section V of said ordinance recites that a hearing as to the rates to be charged by respondent was had and sets out the prescribed rates. (R. 13). These rates resulted from an application made in 1930 by respondent to the City Council of Texarkana, Texas, for increased rates based upon very substantial extensions of the gas transmission system. Respondent's application was denied by the City Council and respondent appealed in 1930 to the Railroad Commission of Texas. The Commission conducted hearing upon the appeal. In the course of the hearing, petitioner proposed a new rate schedule to respondent, whereupon proceedings were reopened in the City Council and new rates were prescribed and set forth in Section V of the franchise ordinance of June 13, 1930. These rates were lower than those applied for and somewhat higher

than the previous rates. The Railroad Commission approved the new rates and dismissed the appeal pending before it (R. 125). The ordinance of June 13, 1930 containing the Section V rates was accepted by respondent. The rates set forth in said Section V of said ordinance were placed in effect on June 13, 1930, in the City of Texarkana, Texas, and have been maintained at all times continuously from that time to the present time.

Section IX of the ordinance of June 13, 1930 is quoted in the opinion below (R. 423). The situation in Texarkana, Arkansas, is complicated and the litigation affecting rates in that city is still pending and unfinished. The rates in Texarkana, Arkansas, have gone up and down, sometimes lower and sometimes higher than the rates in Texarkana, Texas. Respondent, at all times insisting that the rates in Texarkana, Texas, were governed by Section V of the ordinance of June 13, 1930, which sets out the rates prescribed by the City Council of Texarkana, Texas, by virtue of its regulatory powers, and not by the rates of Texarkana, Arkansas, on November 3, 1933, filed with the City Council of Texarkana, Texas, an application for increased rates (R. 19-26). After a number of sessions of the City Council, the application was denied because of the provisions of the franchise ordinance of June 13, 1930 (R. 285-322), and the City Council refused to exercise its rate regulating powers, (R. 432), but directed the City Attorney to continue the litigation in the courts to enforce compliance by respondent with petitioner's construction of

said Section IX. (R. 320-321). The order also contains a notice that the City of Texarkana, Texas, would "one year from this date enter upon a hearing for the purpose of determining whether or not the rates for domestic and commercial consumers should not be reduced to 40c per thousand cubic feet or less". (R. 321). No such hearing has been had.

On March 3, 1934 respondent appealed to the Railroad Commission of Texas from the order of the City Council of January 23, 1934, denying petitioner's application. Petitioner immediately effectively prevented respondent from proceeding in the Railroad Commission of Texas (R. 182 and 183). On April 21, 1934 it filed motion to dismiss the appeal in the Railroad Commission, or to abate all proceedings in the Railroad Commission and suspend action until the final disposition of the litigation. (R. 183). Petitioner on May 23, 1934 amended its suit to include allegations in support of and a prayer for an injunction against respondent from proceeding in the Railroad Commission (R. 281) and against the members of the Railroad Commission from hearing the appeal of respondent. (R. 272). The Railroad Commission refused to act upon respondent's appeal. (R. 161).

II.

OPPOSITION TO THE PETITION.

1. The Court of Appeals did not refuse to obey the mandate of the statute, nor did it place on Section IX of the city ordinance an erroneous interpretation. The first

reason relied upon by petitioner does not measure up to the rules of the U. S. Supreme Court: no conflict between the court below and applicable local decision is asserted by petitioner under the first reason.

The decision of the court below is in conformity with (a) the applicable local decisions construing state statutes; (b) the decisions regarding abdication and delegation of regulatory power (this being the basis of the decision below); and (c) the decisions touching asserted discrimination and holding prescribed rates paramount. The holding of the Court of Appeals that the effect of Section IX was to abdicate the city's rate-making function for the future and to delegate it to the utility and the Arkansas city (R. 431), is discussed below in the argument under the sub-heading, "(1) *Unlawful Abdication and Delegation of Rate-making Functions*". That the rates set out in Section V of the ordinance of June 13, 1930 prescribed by the city of Texarkana, Texas, in the exercise of its rate-making power, are incontrovertible and paramount, is shown below in the argument under the sub-heading, "(2) *Asserted Discrimination. Prescribed Rates Incontrovertible Except by Change in Due Course for the Future.*"

2. The Court of Appeals in deciding that said Section IX was invalid did not decide an important question of local law in a way probably in conflict with applicable local decisions.

The Court of Appeals said:

> "Whatever might be said for the city's side of the case, if, as it assumes, the contract were in effect one in which the utility had agreed, in consideration of the franchise to maintain a fixed rate, we think it perfectly plain that the clause in question is not such a contract." (R. 431).

This decision is not in conflict with the case of *Dallas Ry. Co. v. Geller*, (1925), 114 Tex. 484, 271 S. W. 1106. The proposition argued by petitioner that a utility may be bound by contract to a fixed rate in a franchise, where the city can not itself be bound, was not decided by the Court of Appeals. The Texas jurisprudence, however, does not support such proposition, nor does the *Geller Case*.

3. If the question were one of general law, which patently it is not, the decision of the Court of Appeals is supported by the weight of authority. *Southern Iowa Elec. Co. v. Chariton*, (Iowa 1921), 255 U. S. 539; *Ortega Co. v. Triay*, (Florida 1922), 260 U. S. 103; *Railroad Com. v. Los Angeles Ry. Corp.* (California 1929), 280 U. S. 145; *San Antonio v. San Antonio Public Service Company*, (Texas 1921), 255 U. S. 547; *Houston v. S. W. Bell Telephone Co.* (Texas 1922), 259 U. S. 318.

4. The construction of Section IX of the ordinance is of local importance only and, if enforceable, is without application under the facts and circumstances of the case.

III.

ARGUMENT.

Summary of Argument.

A. The Court of Appeals Did Not Refuse to Obey the State Statutes. On the Contrary the Court Interpreted the State Statutes in Accordance With the State Decisions.

(1) Unlawful Abdication and Delegation of Rate-making Function.

(2) Asserted Discrimination; Prescribed Rates Incontrovertible Except for Change in Due Course for the Future.

B. The Court of Appeals in Deciding Section IX to be Invalid has not decided an Important Question of Local Law in a Way Probably in Conflict with Applicable Local Law.

C. The Court of Appeals did not Decide an Important Question of General Law in a Way Probably Untenable. The Proposition Urged by Petitioner is Opposed to the Great Weight of Authority, but No Question of General Law is Involved.

D. Section IX is Inapplicable, its Conditions not Fulfilled. No Conflict Claimed.

A.

The Court of Appeals Did Not Refuse to Obey the State Statutes. On the Contrary the Court Interpreted the State Statutes in Accordance With the State Decisions.

The Court of Appeals did not refuse to obey the mandate of the statute, nor did it place on Section IX of the city ordinance an erroneous interpretation. The first reason relied upon by petitioner does not measure up to the rules of the U. S. Supreme Court: no conflict between the court below and applicable local decisions is asserted by petitioner under the first reason. The decision of the court below is in conformity with the applicable decisions construing state statutes.

It is well settled in Texas that all acts of a city beyond the scope of its powers are void; that the methods prescribed in the law for exercise of the powers of a city exclude all other methods and must be followed. This is evidenced by the language of the Supreme Court of Texas, quoted and followed in the important recent case of *Texas La. Power Co. v. City of Farmersville*, (1933, Commission of Appeals, Judgment adopted by the Texas Supreme Court), 67 S. W. (2) 235:

> "Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. . . .

"In that opinion (Foster v. Waco, 255 S. W. 1104 by the Supreme Court, Chief Justice Cureton) it was also said: '. . . That where a power is granted and the method of its exercise prescribed, the prescribed method excludes all others and must be followed' ". (p. 239).

The city charter of Texarkana, Texas, a statute of the state of Texas which has been in force for thirty years, limits and defines the powers of the city council. Its provisions are mandatory that a franchise must stipulate that the franchise is subject to the power and duty of regulating, controlling, and fixing rates in accordance with the statutory mandates, going so far as to say that if such express stipulation should be omitted from any franchise, it shall be considered that such stipulation is part and parcel of the franchise just as though expressly written therein. The city charter also provides that the city council shall not prescribe any rate yielding less than 10% on the actual cost of the utility plant. Sections of the city charter are set out in respondent's pleadings (R. 163-166), amongst which are the following:

Section 163:

"Said proposed franchise shall contain all the terms and agreements between the parties thereto, and it must expressly set forth that the council shall have the right and privilege . . . of fixing fares, rates. . . ." (R. 165).

Section 163-a:

"In the event that any franchise . . . shall not contain such stipulations . . . it shall nevertheless be considered that all of the stipulations contained in

Sections 162, 163 and 197 are part and parcel of the said contract and franchise, just as though written therein. . . ." (R. 165, 166).

Section 196:

"The city council shall have the power to regulate by ordinance the rates and compensation to be charged by all . . . gas . . . companies . . . ; provided that the city council shall not prescribe any rate or compensation which will yield less than ten per cent per annum on the actual cost of the physical properties, equipment and betterments. . . ." (R. 166).

Article 1119, Revised Civil Statutes of Texas of 1925, (which was Article 1018, Revised Civil Statutes of Texas of 1911) was originally enacted in 1907 and was the law in force at the time the original gas franchise was issued by the city of Texarkana, Texas. While Article 1119 applies to cities incorporated under the general law, it is in the identical language of Section 196 of the city charter of Texarkana, Texas, supra. This article was interpreted in the important *Uvalde Case*, infra, to prevent the city of Uvalde from contracting as to rates. No different construction should be given to said Section 196 of the city charter.

The leading case in Texas on the powers of a city in Texas, is *City of Uvalde v. Uvalde Elec. & Ice Co.*, (Comm. App. 1923), 250 S. W. 140 (judgment recommended by Commission of Appeals adopted by Supreme Court of Texas). It contains full and clear discussion of the state statutes. It holds that neither the city nor the utility can contract as to rate provisions, although accepted by the utility. The *Uvalde Case* has been subse-

quently approved in a number of recent cases, including one in the Supreme Court of Texas itself, shown under section "B" of this argument.

In *San Antonio v. San Antonio Public Service Company*, 255 U. S. 547 (1921), the United States Supreme Court carefully analyzed and denied the claim that a valid contract as to rates may be made by a city having regulatory power in the state of Texas, holding that there would be such an inevitable conflict between the right to contract as to rates and the dominant power to regulate, as to render the contract inoperative and cause it to perish from the mere fact of admitting it to conflict with the authority to regulate; that the duty of a utility to charge only a reasonable rate and of the government to fix such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. This case arose upon application of the company for a rate increase which was refused by the city, on the ground that the company was bound by the franchise contract to a 5c fare. The decree enjoined the city from enforcing the alleged contract rate and from interfering with the company in substituting a 7c fare for the 5c fare. (p. 554).

In the case of *Houston v. S. W. Bell Telephone Co.* (1922), 259 U. S. 318, the court held that an agreement between a utility company and a city as to the basis for fixing rates was invalid as to either the city or the company; that such an agreement though contractual in form and though accepted and acted upon did not amount to an estoppel.

The *San Antonio* and *Houston Cases* have been frequently cited, approved, and applied in subsequent opinions.

(1) Unlawful Abdication and Delegation of Rate-making Function.

The Court of Appeals did not consider it necessary however to determine what would be the result if a contract had been attempted in which the utility had agreed, in consideration of the franchise, to maintain a fixed rate. The court held that Section IX was not such a contract; that its effect was to abdicate the city's rate-making function and delegate it to the utility and the Arkansas city; that Section IX unlike the clauses in the cases on which petitioner relied, was not one merely agreeing upon a rate which the utility may charge, but was one purporting to bind the city and the utility alike by the future action of the utility and the Arkansas city, peremptorily and without action by the Texas city council (R. 431, 432); and that the city abdicated its rate-making function and refused to exercise it. (R. 432).

Petitioner attempted by means of Section IX to vest in extra-territorial authorities and bodies outside the state of Texas, the non-delegable power and duty to regulate and fix the rates to be charged in the state of Texas under the laws applicable thereto. But the city of Texarkana, Texas, may not make rates vary with and depend on conditions in another city and state having an entirely different regulatory system, and make controlling in the city of Texarkana, Texas, the rates enforced in the city of Texarkana, Arkansa . This would be equivalent to divesting the city council of Texarkana, Texas, of its lawful and sole juris-

diction, which body is charged with the inalienable duty of functioning as a rate regulatory body. It may not, by contract or otherwise, suspend, surrender, abridge, or put in abeyance its ever-present duty to regulate the rates according to law when called upon; and the council, when fixing rates may not change the rates prescribed by it, except in a lawful and authorized method and on the statutory basis. The variation of rates in Texarkana, Texas, dependent on action in another city and automatically following a zig-zag course, violates the state statutes that define the method and the basis on which rates are directed to be determined. (R. 150-154).

Moreover, there is no power vested in the city of Texarkana, Texas, to establish a conditional rate, nor a rate to be charged on a contingency or subsequent and future event, nor a rate to take effect in the present, subject to being revoked and abrogated on account of the happening of some subsequent event or condition and over which it had no control. Such a change or modification of rates is in violation of the well established rules that rates may be changed only after notice and hearing and then only in the event the facts justify the change.

The duty and authority of the city council to grant franchises and fix rates is coupled with the unconditional requirement that it must be by ordinance and that it must contain all the terms and agreements between the parties, which means that the ordinance cannot have incorporated in it some indefinite provision as to rates to perhaps become definite, when and if certain contingencies arise, or when and if something may be done by some other tribunal or

court, or which may result from an election in some other jurisdiction.

In *Nairn v. Bean* (Com. 1932), 121 Tex. 355, 48 S. W. (2) 584, the Commission of Appeal in Texas said:

> "It is well settled that no governmental agency can, by contract or otherwise, suspend or surrender its functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount to an abdication thereof." (p. 586).

This opinion was adopted by the Supreme Court of Texas (p. 586).

In *Bowers v. City of Taylor* (Com. 1929), 16 S. W. (2) 520, the Commission of Appeals in Texas said:

> "The principle is well settled that a city cannot by contract or otherwise surrender its governmental or legislative functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount to an abdication of its governmental function or of its police power." (p. 521).

The Supreme Court of Texas approved the holdings of the Commission (p. 522).

Missouri-Kansas & T. R. Co. v. Railroad Commission, (Tex. Civ. App.) 3 S. W. (2) 489 reads:

> "In the state act, as pointed out above, the rate-making power is taken away from the carrier altogether and vested exclusively in the commission." (p. 495).
>
> "The holding of the commission that the Wichita Falls rates, though approved by it, were in fact

made by the carriers, because made upon their application is unsound. Rates, to be effective under the Texas act, must be made by the commission, and are inoperative other than by force of its orders." (p. 496).

The decision in this case was affirmed by the Supreme Court of Texas. (13 S. W. (2) 679, 682).

In Texarkana, Texas, the power to make gas rates is likewise taken away from the respondent "altogether", and vested in the city council "exclusively". When rates are made it is the city that must make them in accordance with the statutory power,—there being no power given to the city or the utility to contract, surrender, delimit, qualify, restrict, suspend, barter away, abdicate, or delegate the regulatory power.

Also see *Horne Zoological Arena Co. v. City of Dallas* (Civ. App. 1932), 45 S. W. (2) 714; *Green v. San Antonio Water Supply Co.* (Civ. App. 1917), 193 S. W. 453; *City of Corpus Christi v. Central Wharf* (Civ. App.), 27 S. W. 803; 30 Texas Juris, pp.115, 116, 117, paragraph 56; Cooley's Constitutional Limitations, Vol. 1, 234 and 437; Dillon on Municipal Corporations, Vol. 1, page 460, paragraph 244.

(2) Asserted Discrimination; Prescribed Rates Incontrovertible Except for Change in Due Course for the Future.

The respondent utility serves approximately 200 cities, towns, and communities on its system, and its problems in maintaining high standards of service and in charging a fair price for its services are not confined only to

Texarkana, Texas. The unit for rate-making is the city, no matter how many towns are served; and each city must stand on its own feet. *Wabash Valley Elec. Co. v. Young*, 287 U. S. 488. The "public" that the respondent utility is serving is the whole body of customers in the 200 cities and towns on its whole system.

The case of *Texas Gas Utilities Co. v. City of Uvalde* (Tex. Civ. App. 1934), 77 S. W. (2) 750, reads:

> *"Article 6057 expressly provides that different rates may be charged in different places."* (P. 751). (Italics ours).

As between Texarkana, Texas, and Texarkana, Arkansas, during the course of the litigation, the difference in rates has favored Texarkana, Texas. While for two and one-half months the rates in Texarkana, Texas, were somewhat higher than those in Texarkana, Arkansas, the rates in Texarkana, Texas, were considerably lower than those in Texarkana, Arkansas, for a period of nearly three years. Not on the merits or reasonableness of the rates, but on technicalities as to procedure in litigation in Arkansas, respondent temporarily charged in Texarkana, Arkansas, rates which were somewhat lower than those which are set out in Section V of the ordinance of June 13, 1930, but this situation lasted for only two and one-half months from December 1, 1933 to February 16, 1934. On the latter date a temporary injunction was issued as soon as legal procedure would permit, and new rates were

placed into effect in Texarkana, Arkansas, which were higher than the Section V rates in Texarkana, Texas. These new rates continued in effect in Texarkana, Arkansas, from February 16, 1934 to December 4, 1936, nearly three years. The litigation in Arkansas is still unsettled. The city of Texarkana, Texas, admitted:

> "If the gas company is successful in its Arkansas suit, then there will have been no discrimination from and after February 16, 1934". (R. 154).

On the other hand, if respondent should lose its appeal in Arkansas, and the city of Texarkana, Texas, should recover what it prayed for in this case, *the rates prescribed in Texarkana, Texas, in Section V of the ordinance of June 13, 1930 would be abrogated ab initio, without ever having had any operative force whatever*, and the city could go back to 1930 and uproot the rate schedule from its very date and recover reparations for the past eight years. This is in violation of the rule in Texas that no reparations are recoverable where a utility is acting under a rate duly approved by the appointed regulatory body, the rates prescribed by a tribunal vested with regulatory power being *incontrovertible* until set aside in due course for the future. *Producers' Refg. Co. v. Missouri-Kansas & T. R. Co.* (Tex. Com. App.), 13 S. W. (2) 678, at 681, 682. And differences in rates are not sufficient to upset the prescribed schedule. Idem. As recommended by the Commission of Appeals, the Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals. (p. 682).

It is also well settled that the statutes of the State of Texas deprive "railroad companies of the power to make

rates and confers that authority upon the commission". *Railroad Commission v. Weld & Neville*, (Texas Supreme Court), 96 Tex. 405, 73 S. W., 529, 532, per Justice Brown.

Differences in values, expenses, taxes, governmental relations, operating conditions in two cities will cause a wide difference in rates. Enumeration of the differences between the two towns of Texarkana, Texas, and Texarkana, Arkansas, is set out at R. 153. This subject is discussed in *Smythe v. Ames*, 169 U. S. 466, 540; *Mitchell C. & C. Co. v. P. R. R. Co.*, 230 U. S. 247, 255, 256; *Penna. R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 200.

B.

The Court of Appeals in Deciding Section IX to be Invalid Has Not Decided an Important Question of Local Law in a Way Probably in Conflict with Applicable Local Law.

The Court of Appeals in deciding that said Section IX was invalid did not decide an important question of local law in a way probably in conflict with applicable local decisions.

The Court said:

> "Whatever might be said for the city's side of the case, if, as it assumes, the contract were in effect one in which the utility had agreed, in consideration of the franchise to maintain a fixed rate, we think it perfectly plain that the cause in question is not such a contract." (R. 431).

This decision is not in conflict with *Dallas Ry. Co. v. Geller* (1925), 114 Tex. 484, 271 S. W. 1106, in which the plain-

tiff was held not entitled to an injunction preventing the utility from raising its rates above the alleged contractual rate designated as the maximum fare under the utility's franchise.

Petitioner cites the *Geller Case* as authority for the proposition that a utility may be bound by contract to a fixed franchise rate where the city cannot itself be bound. We do not agree that such is the holding of the *Geller Case*, neither do we believe such a holding can be found in the Texas jurisprudence. However, if it should be conceded for argument only that such a rule should exist, it does not conflict with the Court of Appeals opinion in this case.

Even a casual reading of the opinion of the Court of Appeals will disclose that the real basis of the decision is the proposition that a Texas city having rate regulatory duties cannot abdicate and abandon such duties as was attempted in Section IX; neither can it delegate such duties to the utility or some other city governing body. None of these matters is remotely involved in the *Geller Case*.

Petitioner, however, in effect contends that the *Geller Case* conflicts with *Uvalde v. Uvalde Electric & Ice Co.* (1923), 250 S. W. 140, (judgment recommended by the Commission adopted and entered as the judgment of the Supreme Court of Texas, p. 142), and that the decision of the Court of Appeals is in conflict with the *Geller Case*. The Court of Appeals did not consider that there was any such conflict.

Petitioner does not even contend that the decision here is in conflict with *San Antonio v. San Antonio Public*

Service Company, 255 U. S. 547 (1921), *Houston v. S. W. Bell Telephone Co.* (1922), 259 U. S. 318.

The *Geller Case* has only been cited once in a subsequent case in Texas, and then relating to a question of referendum not involved in the case at bar. Denman & Quin (1938, Tex. Civ. App.) 116 S. W. (2) 783 at 786 (Advance Sheets).

As shown below, the *Uvalde Case* has been frequently and recently approved and quoted by the Texas courts. In this connection we direct attention to the weight to be given to the opinion of the Commission of Appeals. The Supreme Court of Texas, in July, 1935, in *National Bank of Commerce v. Williams* (Supreme Court of Texas) 125 Tex. 619, 84 S. W. (2) 691, 692, said:

> "Finally, we wish to say that the Supreme Court is now adopting all opinions of the Commission as the opinions of the court itself. These adopted opinions are given the same force, weight, and effect as the opinions written by the members of the Supreme Court itself. There are, however, a great many opinions of the commission which appear in the Southwestern Reporter that were not adopted or approved by the Supreme Court. These opinions are not binding on the court in the same sense that the approved and adopted opinions are, but they are given great weight by us, and the courts of civil appeals and all lower courts should feel constrained to follow them, until they are overruled by the Supreme Court."

The *Uvalde Case* and the *Geller Case* were under consideration at the same time in the Supreme Court of Texas (p. 27 of petitioner's brief) and no criticism or qualification in any case whatever has been made of the

Uvalde Case. It is clear that it was not overruled by the *Geller Case* or by any other case.

The Supreme Court of Texas, in the case of *Lower Colorado River Authority v. McCraw, Attorney General of Texas,* (1935) 125 Tex. 268; 83 S. W. (2) 629, recognized the principles of the *Uvalde Case* as being well established:

> "It is well established in this state that the Legislature may, by express words, authorize municipal corporations to enter into contracts, prescribing the rates that may be charged by public utility corporations for a definite time. *City of Uvalde v. Uvalde Electric & Ice Co.* (Tex. Com. App.) 250 S. W. 140, and numerous authorities there cited. Of course, such right does not exist unless the legislative authority therefor is clear and unmistakable. Id."

In *Texas-Louisiana Power Co. v. Farmersville* (1933), 67 S. W. (2) 235, the Commission of Appeals (judgment recommended adopted by the Supreme Court of Texas, p. 240) cited the *Uvalde Case* as definitely setting a rule in Texas (p. 239). This opinion was by Mr. Justice Sharp, now on the Supreme Court of Texas.

In *Southern Prison Co. v. Rennels* (1937), 110 S. W. (2) 606, at 609, the Court of Civil Appeals cited the *Uvalde Case,* and also the case of *Texas Gas Utilities Co. v. City of Uvalde,* 77 S. W. (2) 750, quoted below.

In *City of Ft. Worth v. George* (1937), 108 S. W. (2) 929, the Court of Civil Appeals quoted excerpts of the *Uvalde Case.*

In the case of *Texas Gas Utilities Co. v. City of Uvalde* (1934) 77 S. W. (2) 750, the Court of Civil Appeals

cited *City of Uvalde, et al., v. Uvalde Electric & Ice Co.* (Tex. Com. Appl.) 250 S. W. 140; *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U. S. 145, and said:

> "The power to fix rates is absolutely inconsistent with the power to contract for rates, and the city of Uvalde cannot possibly enter into a valid contract for rates, but rates therein must be controlled by the city's rate-fixing power." (p. 752).

Judge Hutchinson, the organ of the court below, is a Texas lawyer, a distinguished member of the bar of that state prior to his elevation to the bench, thoroughly versed in and familiar with the jurisprudence of that state. The opinion purports not to depart from the local law of Texas but to exactly follow and be ruled thereby. It is not likely that it did not achieve its avowed purpose or that it so signally failed in its statement and construction of the applicable Texas decision. It is much more likely that counsel for the petitioner in the zeal of the advocate is mistaken in stating that the court below neither correctly construed nor followed the local law.

C.

The Court of Appeals Did Not Decide an Important Question of General Law in a Way Probably Untenable. The Proposition Urged by Petitioner is Opposed to the Great Weight of Authority. But No Question of General Law is Involved.

If the question were one of general law, which patently it is not, the decision of the Court of Appeals is supported by the weight of authority. *Southern Iowa Elec.*

Co. v. Chariton, (Iowa 1921), 255 U. S. 539; *Ortega Co. v. Triay*, (Florida 1922), 260 U. S. 103; *Railroad Com. v. Los Angeles Ry. Corp.* (California 1929), 280 U. S. 145; *San Antonio v. San Antonio Public Service Company*, (Texas 1921), 255 U. S. 547; *Houston v. S. W. Bell Telephone Co.* (Texas 1922), 259 U. S. 318.

It might be pointed out that there was no holding in the case of *Knoxville v. Knoxville Water Co.*, 189 U. S. 434, that the utility bound itself by contract to a maximum fare. That question was not involved. The company had not applied to increase the rates, but was insisting that both the company and the city were bound to the rates as a contract. The holding was that the rate contract was not valid and did not prevent a reduction in rates by the city having regulatory power and that the company took its charter subject to that power.

It is submitted that the local laws of Texas as found in the statutes and decisions in that state are controlling and that no principle or question of General Law is involved.

D.

Section IX is Inapplicable, Its Conditions Not Fulfilled. No Conflict Claimed.

The construction of Section IX of the ordinance is of local importance only and, if enforceable, is without application under the facts and circumstances of the case.

Section IX, if it should be held to be valid or capable of application under any circumstances, is not applicable to the case. The condition of Section IX has not been fulfilled. The condition or effective date set out in Section IX is not to be prior to such time as grantee may have been finally compelled to place into effect in the city of Texarkana, Arkansas, less rates than those prescribed in Section V of the ordinance of June 13, 1930 in Texarkana, Texas. Only on that condition and only at such time could Section IX apply, even if it were valid. "Then and thereupon, the lessened rate shall apply. . . ." This is purely future. Petitioner admits that the contest over the Arkansas rates is not finally settled. Respondent did not voluntarily change its rates in Texarkana, Arkansas, but the city contends that respondent was finally compelled to do so, which is denied by respondent and confessed by petitioner's motion to dismiss.

For a period of nearly three years the rates were higher in Texarkana, Arkansas, than in Texarkana, Texas, although the rates were temporarily somewhat lower in Texarkana, Arkansas, than in Texarkana, Texas, for the short space of two and one-half months required for preparing and filing a new suit. The previous suit was dismissed not on the merits of the rates but on technicalities of procedure. This short period ended on February 16, 1934, when higher rates were placed into effect in Texarkana, Arkansas, and continued for nearly three years and the litigation for that period and subsequent periods is not yet finished, but is still pending.

This does not amount to a final settlement of the rates in Texarkana, Arkansas, nor to a final compulsion, nor to the fulfillment of the condition of Section IX.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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September 12, 1938.

APPENDIX

ARTICLE 1119 REV. CIVIL STATUTES.

Article 1119 Rev. Civil Statutes of Texas enacted in 1907 remained in full force and effect from 1907 until amended in 1937. The amended Article of 1937 is not relevant to this case. We therefore set out the original article.

Article 1119.

Art. 1119. (1018) Rates prescribed, etc.—The governing body of all cities and towns in this State of over two thousand population, incorporated under the general laws thereof, shall have the power to regulate, by ordinance, the rates and compensation to be charged by all water, gas, light and sewer companies, corporations or persons using the streets and public grounds of said city or town, and engaged in furnishing water, gas, light or sewerage service to the public, and also to prescribe rules and regulations under which such commodities shall be furnished, and service rendered, and to fix penalties to enforce such charges, rules and regulations. The governing body shall not prescribe any rate or compensation which will yield less than ten per cent per annum net on the actual cost of the physical properties, equipment and betterments. (Acts 1907, p. 217, par. 1).

The amendatory act 1931, 42nd Leg., p. 380, ch. 226, par. 1, was held invalid in Texas-Louisiana Power Co. v. City of Farmersville (Com. App.) 67 S. W. (2d) 235, rev'g (Civ. App.) 55 S. W. (2d) 195, leaving original act in full force and effect.